STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of J, Minor.

UNPUBLISHED
June 24, 2014

No. 319359
Oakland Circuit Court
Family Division
LC No. 13-811662-RB

Before: O`CONNELL, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

Respondent appeals by right from a circuit court order terminating his parental rights to the minor child pursuant to § 39 of the Adoption Code, MCL 710.39. We affirm.

Before a child can be adopted, the parents must release their parental rights, MCL 710.28(1)(a), or consent to the adoption, MCL 710.43(1)(a). If a child is born out of wedlock and the release or consent of the father cannot be obtained, the child cannot be adopted until the father's parental rights are terminated. MCL 710.31(1). The mother can petition the court for a hearing "to determine whether the child was born out of wedlock, to determine the identity of the father, and to determine or terminate the rights of the father" under § 37 or § 39 of the Adoption Code, MCL 710.37 and MCL 710.39. MCL 710.36(1). If the putative father is identified and he is interested in custody of the child, the court must determine his interests under § 39.

MCL 710.39 "classifies putative fathers into two groups, each having a different level of legal protection for their parental rights." *In re BKD*, 246 Mich App 212, 216; 631 NW2d 353 (2001). MCL 710.39 provides, in relevant part:

> (1) If the putative father does not come within the provisions of subsection (2), and if the putative father appears at the hearing and requests custody of the child, the court shall inquire into his fitness and his ability to properly care for the child and shall determine whether the best interests of the child will be served by granting custody to him. If the court finds that it would not be in the best interests of the child to grant custody to the putative father, the court shall terminate his rights to the child.
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> (2) If the putative father has established a custodial relationship with the child or has provided substantial and regular support or care in accordance with [his] ability to provide such support or care for the mother during pregnancy or for either mother or child after the child's birth during the 90 days before notice

> of the hearing was served upon him, the rights of the putative father shall not be terminated except by proceedings in accordance with section 51(6) [MCL 710.51(6) (stepparent adoption)] or section 2 of chapter XIIA [MCL 712A.2 (child protective proceedings)].[1]

Section 39(2) requires the court to consider two different types of involvement by the putative father: (1) whether he established a custodial relationship with the child, or (2) whether he provided substantial and regular support or care commensurate with his ability (a) for the mother during her pregnancy, or (b) for the mother or the child after the child's birth. If the putative father meets one of these criteria, he is entitled to the same legal protection of his parental rights as a legal father, *In re BKD*, 246 Mich App at 216, and his parental rights can only be terminated under § 51(6) of the Adoption Code, MCL 710.51(6), or under § 19b of the Juvenile Code, MCL 712A.19b. MCL 710.39(2). The trial court found that § 39(2) was not applicable in this case and terminated respondent's parental rights under § 39(1).

Respondent first argues that the trial court erred in denying his "implied request for a stay" based on evidence confirming that he was the child's biological father. Because respondent did not actually move for a stay of the proceedings and thus the trial court did not purport to deny a stay, this issue has not been preserved for appeal. *Lenawee Co v Wagley*, 301 Mich App 134, 164; 836 NW2d 193 (2013). "Review of an unpreserved error is limited to determining whether a plain error occurred that affected substantial rights." *Rivette v Rose-Molina*, 278 Mich App 327, 328; 750 NW2d 603 (2008).

In *In re MKK*, 286 Mich App 546, 548, 555; 781 NW2d 132 (2009), this Court addressed "the interplay of the Adoption Code, MCL 710.21 *et seq*., and the Paternity Act, MCL 722.711 *et seq*." to determine which case "takes precedence when contemporaneous actions have been filed under each." This Court held that "adoption proceedings may be stayed upon a showing of good cause, as determined on a case-by-case basis." *Id.* at 555. This Court found that the respondent-father had demonstrated good cause because it was undisputed that he was the child's biological father, he had timely filed a paternity action, had made "efforts to provide support and prepare for fatherhood," and the evidence did not indicate that he had filed the paternity action "simply to thwart the adoption proceedings[.]" *Id.* at 563.

In this case, it was undisputed that respondent was the child's biological father as determined by a DNA test. However, that alone did not constitute good cause to stay the proceedings. At issue here was termination or preservation of the putative father's rights. A "putative father" is a man alleged to be the biological father but who is not a legal father, i.e., a man who has established paternity in a legally-recognized manner. MCR 3.903(A)(7) and (24)[2]

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[1] 2014 PA 119 has amended MCL 710.39, effective October 12, 2014, but subsections 1 and 2 of § 39 remain unchanged.

[2] Although this definition is only applicable to delinquency and child protective proceedings, MCR 3.901(B)(1), there is no reason it should have a different meaning for purposes of the Adoption Code, which does not define the term. See MCL 710.22. For example, the Paternity Act does not define the term "putative father," MCL 722.711, but this Court defined it as "a man

The DNA test showed only that respondent was the child's biological father, which was conclusive on the issue of the "the identity of the father" under § 36(1) of the Adoption Code. But respondent's status as the biological father did not transform him from a putative father into a legal father. Cf. MCR 3.921(D) (if a child does not have a legal father, but a putative father has been identified, the court may conduct a hearing to determine whether the putative father is the natural father of the child and, if so, whether he should be allowed time to establish legal paternity). The biological father may become a legal father by an order of filiation or judgment of paternity, MCR 3.903(A)(7)(c), and an order of filiation can be entered in a proceeding under the Paternity Act. MCL 722.717(1).

The reason for the stay in *In re MKK* was to allow the biological father to establish legal paternity through an order of filiation in a pending paternity action. If a man is a legal father rather than a putative father, his rights cannot be terminated under § 39 of the Adoption Code. In this case, by contrast, respondent had not sought an order of filiation in a case filed under the Paternity Act or express any intent to file an action under the Paternity Act, much less request a stay in order to file such an action. Because respondent did not request or show a need for a stay, the trial court's failure to stay the proceeding cannot be considered plain error. Moreover, since the trial court's discretion was never invoked, it can hardly be said that it was abused. See *Dayhuff v Gen Motors Corp*, 103 Mich App 177, 184-185; 303 NW2d 179 (1980) (a trial court does not abuse its discretion when a party does not invoke it).

Respondent next argues that the trial court erred in determining that § 39(2) was not applicable in this case. The trial court's determination whether § 39(1) or § 39(2) is applicable is a question of law that is reviewed de novo on appeal. *In re RFF*, 242 Mich App 188, 195; 617 NW2d 745 (2000). The trial court's findings of fact are reviewed for clear error. *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 651; 662 NW2d 424 (2003).

The trial court found that no relationship existed between respondent and the child. That finding is supported by both the mother's and respondent's testimony and, accordingly, is not clearly erroneous. Indeed, respondent does not argue that he had a custodial relationship with the child. The only consideration is whether respondent provided "substantial and regular support or care" commensurate with his ability.[3]

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reputed, supposed, or alleged to be the biological father of a child." *Girard v Wagenmaker*, 173 Mich App 735, 740; 434 NW2d 227 (1988), rev'd on other grounds 437 Mich 231 (1991).

[3] Respondent contends that this Court should determine this issue by application of the factors outlined in *In re Dawson*, 232 Mich App 690, 694; 591 NW2d 433 (1998), which in turn relied on *In re Gaipa*, 219 Mich App 80; 555 NW2d 867 (1996). We disagree. At the time those cases were decided, § 39(2) required the court to consider only whether the putative father had provided "support or care." This Court determined that "support or care" meant "reasonable support or care under the circumstances of the case" and identified various factors to consider in determining whether the support or care was reasonable under the circumstances. *Gaipa*, 219 Mich App at 86. The Legislature has made it clear that "reasonable support or care under the circumstances" is not sufficient by amending the statute to replace the former language "support or care," with "substantial and regular support or care in accordance with [his] ability to provide

Some evidence showed that respondent took an interest in planning for the child once he learned the mother was pregnant. Respondent testified that he had a dating relationship with the mother during her pregnancy. There was no evidence regarding respondent's ability to provide financial support to the mother during her pregnancy. Respondent did arrange a place for him and the mother to stay in the event the mother found herself in need of somewhere to live, but there was no evidence that the mother ever took advantage of that arrangement. Arranging for alternative housing does not qualify as "substantial and regular" care. Respondent admitted that he was employed when the child was born and thus he had some ability to provide financial support for the mother or the child after the child was born. Respondent admitted that he never gave the mother any money for her support, and the mother testified that respondent did not contribute to the child's support. Respondent testified that he set aside some of his income for the child's benefit, but never actually spent it on the child. Such evidence would support a finding that respondent was prepared to provide substantial and regular support commensurate with his ability, but not that he "has provided" such support. In sum, while respondent demonstrated an interest in providing support or care for the mother or the child, he never actually provided "substantial and regular support or care" commensurate with his ability. Therefore, the trial court did not err in determining that § 39(2) was not applicable in this case.

We affirm.

/s/ Peter D. O'Connell
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey

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such support or care." See 1998 PA 94, effective September 1, 1998. Because reasonableness is no longer the standard for determining whether a putative father meets the support or care element, the *Gaipa* factors are not relevant.